

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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)
In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/FLN)
Liability Litigation)
) September 20, 2018
) Minneapolis, Minnesota
) Courtroom 12W
) 9:45 a.m.
)
)

BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES MAGISTRATE JUDGE

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13 Proceedings recorded by mechanical stenography;
14 transcript produced by computer.

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P R O C E E D I N G S

(9:34 a.m.)

THE COURT: Good morning. Please be seated. All right. Why don't we begin with appearances for the plaintiffs?

MS. ZIMMERMAN: Yes, good morning, Your Honor. Genevieve Zimmerman for the plaintiffs.

THE COURT: Good morning, Ms. Zimmerman.

MR. ASSAAD: Good morning, Your Honor. Gabriel Assaad for the plaintiffs.

THE COURT: Mr. Assaad.

MR. SACCHET: Good morning, Your Honor. Michael Sacchet for the plaintiffs.

THE COURT: Mr. Sacchet.

MR. SZERLAG: Good morning, Your Honor. David Szerlag on behalf of the plaintiffs.

THE COURT: Mr. Szerlag.

MR. HODGES: Good morning. David Hodges on behalf of plaintiffs.

THE COURT: Good morning, Mr. Hodges.

MS. KRAFT: Good morning, Your Honor. My name is Kristine Kraft. I'm appearing for the plaintiffs but also specifically for my client Kim Gauthier, G-A-U-T-H-I-E-R, case number 18CV00572, because she's on the defendant's motion to dismiss.

1 THE COURT: All right. Good morning.

2 MR. LAURICELLA: Good morning, Your Honor. Noah
3 Lauricella for the plaintiffs.

4 THE COURT: Good morning, Mr. Lauricella.

5 All right. For the defendants?

6 MR. BLACKWELL: Good morning, Your Honor. Good to
7 see you. Jerry Blackwell speaking for 3M.

8 THE COURT: Welcome back from your meditation.

9 MR. BLACKWELL: I feel very calm, Your Honor.

10 THE COURT: Good morning, Mr. Blackwell.

11 MS. PRUITT: Lyn Pruitt, Your Honor.

12 THE COURT: Good morning, Ms. Pruitt.

13 MR. HULSE: Good morning, Your Honor. Ben Hulse
14 for 3M.

15 THE COURT: Good morning, Mr. Hulse.

16 MS. AHMANN: Good morning. Bridget Ahmann for 3M.

17 THE COURT: Good morning, Ms. Ahmann.

18 MS. YOUNG: Your Honor, Mary Young for 3M.

19 THE COURT: Good morning. All right. Well, is it
20 Kraft, Ms. Kraft?

21 MS. KRAFT: Yes.

22 THE COURT: Let's start with this, I'm going to
23 disappoint you all in the following way. Since Judge
24 Ericksen, you may have noticed, is not here, I am not going
25 to hear the motions to dismiss. Certainly I can do that,

1 issue an R&R, and then that would be referred to or appealed
2 to or what have you to Judge Ericksen, fairly inefficient
3 process, so any of the motions that are dispositive will be
4 put over to the October status conference, and Judge
5 Ericksen will deal with those at that time.

6 And so with that, who wants to start walking down
7 the agenda?

8 MS. ZIMMERMAN: I can do so. All right. Good
9 morning, Your Honor.

10 So first on the agenda I guess are just pretrial
11 orders. And with respect to Ms. Axline's case, we had an
12 update for the Court about dispositive motion practice, and
13 I think that we have an agreement about when those are
14 going, there's a compressed briefing schedule given some of
15 the comments I think that we received either from Your Honor
16 or from maybe even Judge Noel before he retired. So those
17 will be filed by the 8th of October and completely briefed
18 by the 1st of November.

19 We completed a meet and confer process with
20 respect to a fourth coming motion. And this is jumping kind
21 of ahead, a Rule 15 motion to amend the complaint, motion
22 for leave to amend the complaint in Axline in light of the
23 Court's ruling with respect to the choice of law issue. We
24 completed that conference I think last night about 5:00.
25 Defendants have indicated that they will not stipulate to

1 the amendment, and they will be opposing the motion. Having
2 completed that, we plan to file that motion today, and we
3 will get that set as soon as we possibly can.

4 Obviously, we're looking at some pretty compressed
5 deadlines here. The only deposition that is likely to take
6 place with respect to Ms. Axline is set for next Friday, the
7 28th, that is of Dr. William Jarvis, plaintiff's infectious
8 disease expert. Plaintiffs have elected with respect to
9 Ms. Axline's case not to depose defendant's experts. We
10 appreciate Your Honor's ruling with respect to the Rule 37
11 motion this morning, and given that we will just for sake of
12 preserving our record as we discussed will be appealing that
13 to Judge Ericksen.

14 THE COURT: Right. Let me just comment on that
15 because I know there was a disagreement or a lack of clarity
16 about whether or not the 14 days was running from the oral
17 order at the hearing. It was my intention that, well,
18 frankly, one, to get the written order out more quickly than
19 as it turned out we did, but that your time would run from
20 the written order being issued but that you should assume in
21 terms of the grounds that have been articulated that the
22 combination of those two really both the verbal order at the
23 hearing and the written order comprise the full order as it
24 were because we didn't put everything into the written order
25 that necessarily was said at the hearing itself.

1 MS. ZIMMERMAN: Yes, Your Honor. And the
2 plaintiffs are certainly willing. It was our understanding
3 and hopefully consistent with the Court's indication that we
4 would be just for sake of preserving our record making that
5 appeal to Judge Ericksen, but we understand the Court's
6 ruling, and as I indicated at that hearing, we will be
7 bringing essentially what I call reciprocal Rule 37 motion
8 with respect to new general causation opinions that were
9 either known or knowable by defendant's expert as well, and
10 we will endeavor to have that done in an expedited manner
11 such that both could be considered by the Court quickly.

12 Hopefully, it won't impact depositions going
13 forward given the plaintiffs' decision with respect to
14 depositions on Axline, but just as a matter of equity, we're
15 going to bring the same motion essentially that they
16 brought.

17 THE COURT: Okay. And I suspect though I do not
18 know that those will end up in front of me, but we'll find
19 that out.

20 MS. ZIMMERMAN: Okay. And if there's a time
21 frame, I mean we can certainly work with Your Honor's
22 schedule to try and expedite that. I understand that
23 there's likely to be a bit of briefing here in the next six
24 weeks. And as we get, as we move towards December, you
25 know, we want to be mindful of the Court's time and the

1 resources of the Court, and then also the parties. And
2 then, of course, depending on what happens with Rule 15 and
3 the motion for leave to amend that complaint, that may
4 certainly impact the trial in December.

5 THE COURT: Is, well, that's a good segue, I
6 guess. What is it that you intend to seek to amend the
7 Complaint to add? And where do you think that leaves us
8 with respect to the trial?

9 MS. ZIMMERMAN: Well, so I think that what
10 plaintiffs intend to seek leave to amend is to assert claims
11 that would have been provided under the Ohio Products
12 Liability Act. It's a statutory framework for products
13 liability claims including strict liability, failure to warn
14 and negligence. It's been essentially there was a brief
15 that really had to do with choice of law from the
16 plaintiffs' perspective.

17 We indicated at the end of our opposition to the
18 judgment for a ruling as a matter of law on the pleadings
19 that if the Court is to find that Ohio law is going to apply
20 to Ms. Axline's case, which the Court did, that the
21 plaintiff ought to be permitted leave, but we did not bring
22 a formal Rule 15 motion at the time.

23 I'm not sure what the Court will do with a formal
24 Rule 15 motion, but if the only remaining claims, if, for
25 example, the Rule 15 motion is denied, and the only

1 remaining claims with respect to Ms. Axline relate to
2 Minnesota Consumer Protection Statutes, it is my expectation
3 that the case will not be tried in December. I think --

4 THE COURT: Because?

5 MS. ZIMMERMAN: Well, I think it's hard from the
6 plaintiffs' perspective to see that we're going to all the
7 expense of putting the Court through the motions of trying
8 the case, putting the plaintiff and the experts through the
9 motion to try the case on some Consumer Protection claims
10 which, frankly, I understand the defendants intend to bring
11 a motion for summary judgment on as well.

12 So, again, given that this is an MDL, and we're
13 trying to do a bellwether trial, we're hoping to avoid some
14 of these procedural I guess what we would call maybe
15 housekeeping matters. I understand that they're more
16 substantive than just housekeeping matters, but just in all
17 candor as an officer of the Court, I think it's unlikely
18 that that case will be tried if the Rule 15 motion is
19 denied.

20 THE COURT: Well, just an observation back, I'm
21 not so sure it would be, if it were to go forward, it would
22 be terribly representative or instructive.

23 MS. ZIMMERMAN: Yes, Your Honor, exactly the
24 point. I think that the evidence that would be introduced,
25 and the testimony would be so limited so as to not be

1 instructive or representative to the parties or to the
2 Court. And from the plaintiff's perspective, that would
3 make it just not a good use of resources all around.

4 THE COURT: All right. We'll cross that bridge, I
5 guess, when we get to it. How would you plan to deal with
6 that if the Rule 15 were to be denied, what would you --
7 what's your suggestion or what is your claim with respect to
8 Axline then in terms of mechanically?

9 MS. ZIMMERMAN: Sure. Mechanically, I guess I
10 have to consult specifically with the attorneys that
11 represent Ms. Axline. They expected to be here, but there
12 was an emergency motion in another case. It is my
13 expectation that they would likely stipulate to dismiss the
14 remaining consumer protection claims and see what options
15 remain for their client with respect to appeal at that
16 point.

17 THE COURT: Okay. Very well. Thank you.

18 MS. ZIMMERMAN: Yes. And I think --

19 THE COURT: Why don't we stay on Axline in general
20 right now.

21 MS. ZIMMERMAN: Sure.

22 THE COURT: What else from your perspective do we
23 need to discuss on Axline?

24 MS. ZIMMERMAN: I think with respect to Axline,
25 really the only, I mean the Rule 15 matter I think we've

1 covered. Plaintiffs anticipated motion with respect to the
2 Rule 37 motion with respect to defendant's experts, that is
3 something that we intend to bring. We have, I know that
4 there is a motion scheduled to be heard before Your Honor on
5 Monday with respect to a motion to compel certain documents
6 from Dr. Jarvis. I believe that we have cured and that they
7 have all the documents, but we have to discuss that as well.
8 We made an additional production this week.

9 Oh, and then the other issue, and there isn't a
10 candidly a motion before Your Honor, but defendant's brought
11 a third party subpoena with respect to the Mount Carmel
12 Hospital, and we did receive certain productions of
13 documents from the hospital and that's where Ms. Axline's
14 surgery took place.

15 After the close of discovery and after the
16 disclosure of plaintiffs' expert reports, there was a
17 supplemental production from the Mount Carmel Hospital and
18 that production included for the first time details about
19 essentially the air ventilation system of the hospital
20 filtration air change rates, that sort of thing.

21 We, at the time, asked for defendant's agreement
22 that we be permitted given the late production that our
23 experts be permitted to look at it and provide a
24 supplemental or an expert report with respect to those
25 issues. And that, alternatively, if plaintiffs not be

1 allowed to do that, that defendants also not be permitted to
2 rely on any such tardy produced information.

3 The defendants have declined on both counts. They
4 have denied our ability to submit an expert report on that
5 issue, and they have provided, I guess, they've provided
6 expert reports. I don't know if they would really be
7 rebuttal reports as we have not disclosed engineering
8 reports with respect to Ms. Axline. So I guess they're not
9 technically rebuttal reports, but they are reports in Axline
10 with specific reference to these documents that we didn't
11 have prior to the close of discovery in our experts.

12 THE COURT: They would certainly be case specific
13 reports, whatever category of case specific reports they fit
14 into.

15 MS. ZIMMERMAN: Yes, at least in part they are,
16 and so that is one additional issue with respect to Axline.

17 And then we also indicated that the defendants
18 provided supplemental responses to discovery requests,
19 interrogatories after the close of discovery, and those were
20 also untimely. So while we have not brought a formal
21 motion, and I'm in consultation with the individual
22 attorneys for Axline, there may be a motion forthcoming with
23 respect to striking those answers.

24 THE COURT: Okay. Anything else on Axline?

25 MS. ZIMMERMAN: I don't believe so, Your Honor.

1 THE COURT: Let me hear from the defendants on
2 Axline, if you have something you wish to discuss.

3 MR. BLACKWELL: Good morning, again, Your Honor.
4 Jerry Blackwell for 3M.

5 THE COURT: Good morning.

6 MR. BLACKWELL: The only point we would make with
7 respect to the discovery disputes in Axline I guess
8 referenced on page 7 of our agenda is that the defendants
9 felt that to the extent we have disputes about discovery,
10 it's understood that the status hearing each month is not
11 the proper place to be raising them. And so we had
12 indicated to the plaintiffs that, again, we have a process
13 for meet and confer on it, and they know they should be
14 raised by way of formal motion before Your Honor.

15 But just to be clear to the extent there's any
16 supplementation that was referred to by 3M with respect to
17 discovery, it was simply supplementing contention
18 interrogatories after the close of discovery by the experts,
19 and that's a fairly typical standard. So that's all there
20 was, and the plaintiffs are trying to use that as a fulcrum
21 for doing something more fulsome on their side, and we take
22 issue with it.

23 THE COURT: Understood.

24 Let me ask you, Mr. Blackwell, while you're there,
25 you almost got away. And maybe this is Mr. Hulse, but

1 there's also the question of what's going on with respect to
2 the deposition, the five minute deposition of Doctor --

3 MR. BLACKWELL: Dr. Lombardy.

4 THE COURT: Lombardy, thank you.

5 MR. BLACKWELL: So Dr. Lombardy's counsel has been
6 in a trial, and as of this date hasn't been able to give us
7 an actual date for our five minutes. And, Judge Schultz,
8 what we decided just as our own internal deadline is we
9 would give it until October 1st to try to get a date and
10 time certain to complete that. And failing that occurring,
11 we would come back before Your Honor to seek a different
12 form of relief over the issue.

13 THE COURT: Okay.

14 MR. BLACKWELL: Thank you, Your Honor.

15 THE COURT: Thank you. So this is obviously kind
16 of musing out loud, and I'll have to talk to Judge Ericksen,
17 obviously, about this but there's a lot of procedural
18 motions and various other motions that need to be brought if
19 this Axline case is to stay on track. And one thing we know
20 is if it goes to trial, we know what day it's going to
21 trial.

22 But it strikes me listening to all of you that if
23 there is, there is sort of a threshold issue, if you will,
24 with the Rule 15 motion, and I'm not suggesting, you know,
25 which way that will go, but it strikes me that it may make

1 some sense to move that as quickly as possible because it
2 may end up obviating the need for any of the other motions,
3 which save the party's time and money and saves the Court
4 time as well.

5 So I'll talk to Judge Ericksen, but I think,
6 Ms. Zimmerman, you said that you had planned to get the
7 motion on today, correct? To file it today?

8 MS. ZIMMERMAN: Yes, Your Honor.

9 THE COURT: Mr. Blackwell, how quickly can the
10 defendants reply to that?

11 MR. BLACKWELL: Your Honor, we think by Tuesday.

12 THE COURT: By Tuesday, okay.

13 All right. Once that's done, I guess we'll set it
14 on for a hearing or not, as the case may be, in front of me
15 or Judge Ericksen. We'll find that out. Okay?

16 MS. ZIMMERMAN: Would the Court have any direction
17 about whose office we should check with in terms of a
18 hearing?

19 THE COURT: Come on up. Just making sure we get
20 this. Yeah, I suspect that you should check with my office
21 about the hearing date but, again, because Judge Ericksen is
22 out of the country, and I'm not sure when she will be
23 returning. I'm sure you know, Cathy.

24 THE CLERK: The 28th.

25 THE COURT: So I'll communicate with her. We'll

1 communicate with her, but why don't you communicate with my
2 office.

3 MS. ZIMMERMAN: Your chambers, I'm happy to do
4 that. Thank you, Your Honor.

5 THE COURT: Just so for planning purposes, you'll
6 file today.

7 MS. ZIMMERMAN: Yes, Your Honor.

8 THE COURT: And, Mr. Blackwell, that will be the
9 22nd, is that? No, 24th. What's Tuesday?

10 MS. PRUITT: 25th.

11 THE COURT: The 25th. The defendants will file
12 their response on the 25th. Okay.

13 MS. ZIMMERMAN: Thank you, Your Honor.

14 THE COURT: All right. Anything further on
15 Axline?

16 MR. BLACKWELL: Your Honor, no, not Axline, but
17 it's a scheduling issue generally, so.

18 THE COURT: Okay, come on up.

19 MR. BLACKWELL: So it doesn't involve a problem.
20 It's just simply advising the Court that I did check with
21 Cathy earlier in the week about potential trial dates into
22 2019 for the next setting, so we were able to get some
23 options, and we're in the midst of discussing those with the
24 plaintiffs. It would be useful if Her Honor Judge Ericksen
25 and Your Honor Judge Schultz could confer as to how many

1 trial settings would the Court like to see in 2019? And
2 then perhaps we could get them all set. You know, two a
3 year, is fantastic. I suspect the Court may want to see a
4 few more than that, you know, but it would be helpful to
5 note them so we can get those set.

6 THE COURT: Okay, very well.

7 MR. BLACKWELL: Thank you, Your Honor.

8 THE COURT: Will do. All right. Well, I think we
9 started with agenda Item Number 1 and transitioned from
10 there. Is there anything further on Item Number 1?

11 MS. ZIMMERMAN: No, Your Honor.

12 THE COURT: Item Number 2, the plaintiff fact
13 sheets, do we need to discuss anything about those in light
14 of the fact that I'm not hearing about the dismissals?

15 MR. HULSE: No, Your Honor.

16 THE COURT: No, okay. All right. Very well. How
17 about let's get an update on the cases in the MDL, the
18 related State Court proceedings, and the Canadian action, if
19 we can.

20 MR. SZERLAG: Good morning, Your Honor. Just an
21 update on the number as of yesterday, there are now 4908
22 active cases in the MDL. I don't think anything has changed
23 from my understanding as far as the State Court cases.

24 THE COURT: Okay.

25 MR. SZERLAG: Or the Canadian action as well.

1 THE COURT: Very well. Thank you, Mr. Szerlag.
2 Mr. Hulse, anything on that?

3 MR. HULSE: Just a typo, Your Honor. The number
4 of dismissed cases is not 410. It was 494 as of last
5 Friday.

6 THE COURT: Okay. I guess this Item Number 6 on
7 the agenda, I guess that goes back to Axline or --

8 MS. AHMANN: Thank you, Your Honor. In connection
9 with the six other cases that have been selected and will be
10 worked up, we have been getting third party discovery from
11 hospitals. We did the same with Axline, and sometimes the
12 hospitals request to be protected for their confidential
13 information under the protective order, which is PT07.

14 With one of the six cases, the *Trombley* case, Bay
15 Park Hospital requested protection by the protective order,
16 so pursuant to paragraph 17, which allows protection if the
17 parties agree to the extension to third parties, we
18 requested that plaintiffs agree that what the hospital
19 provided would be subject to the protective order. We did
20 the same at Axline, and there was a simple agreement and
21 there was no issue.

22 In this particular case, we heard from the
23 plaintiff's counsel that they would only agree if the
24 hospital stipulated that they would provide all
25 correspondence with defendants to the plaintiff's counsel,

1 and if they would provide documents. Our response basically
2 was, first of all, we always provide documents that we get.
3 But, second of all, we can't talk for the hospital, and we
4 certainly think it is inappropriate to condition protection
5 under the protective order to something that the plaintiffs
6 want. So we would not agree and could not agree, so we
7 asked the Court to be able to extend the protective order to
8 any production by Bayport or, excuse me, Bay Park Hospital
9 so that they can produce their documents.

10 THE COURT: Okay. Ms. Zimmerman, do you want to
11 be heard on this?

12 MS. ZIMMERMAN: Your Honor, I believe co-lead
13 counsel Mr. Ben Gordon is on the telephone. It's his
14 client, so I think he is prepared to address the Court if he
15 is able to speak.

16 THE COURT: If he can, Mr. Gordon, bear with us a
17 second.

18 All right. Mr. Gordon, are you there?

19 MR. BEN GORDON: I am indeed, Your Honor. Good
20 morning.

21 THE COURT: Do you wish to speak on this issue of
22 the protective order in *Trombley*?

23 MR. GORDON: Yes, Your Honor. Briefly, my partner
24 Daniel Nigh has been the one most involved in the particular
25 communications with the defendant on this issue. As I

1 understand the issue, we believe that the defendants, we're
2 happy to extend the protective order, but we believe the
3 defendant's communications with the third party should be
4 provided to us. We should be part of that communication
5 channel. It's common in all MDLs for both counsel for the
6 opposing sides to communicate with a third party so that
7 there's not any concern about inappropriate or otherwise ex
8 parte communications. It's happened in *Xarelto* and every
9 other MDL I'm familiar with, we simply ask for that courtesy
10 that they share the communications with the third party with
11 us as plaintiff's counsel.

12 THE COURT: Okay. Thank you, Mr. Gordon. I'm
13 going to mute your line for a moment. Go ahead.

14 MS. AHMANN: Your Honor, I was just going to say
15 it's two different issues. We're requesting that the
16 protective order be extended to them so that they can
17 provide the information. We always provide copies of what's
18 produced to the plaintiffs.

19 THE COURT: All right, understood. Let me --
20 Mr. Gordon, any last comments?

21 MR. GORDON: No, Your Honor. I think you have our
22 position. Thank you.

23 THE COURT: Okay. I do agree with Ms. Ahmann.
24 Those are separate and distinct issues, so I will verbally
25 now extend the protective order to the hospital, but I think

1 we'll follow-up and make sure that that gets done
2 appropriately.

3 As to whether or not the defendants share their
4 communications with the hospital, with the plaintiffs absent
5 some indication that they're not behaving appropriately or
6 sharing the communication they need to, I'm going to assume
7 that they will. If there is such an issue, by all means
8 bring it to the Court's attention. But just for purposes of
9 this morning and clarity, the protective order protections
10 are extended to the hospital in *Trombley*, and you can inform
11 them of that.

12 Ms. Ahmann, is there anything further on that
13 issue?

14 MS. AHMANN: No.

15 THE COURT: Okay. All right. Anything further
16 from the plaintiffs on that issue?

17 MS. ZIMMERMAN: Not at this time, Your Honor.

18 THE COURT: Okay. Thank you.

19 All right. I believe we've gone over the status
20 of discovery, Item Number 7.

21 Item Number 8, other pending motions, who wishes
22 to address that? Or are those all dismissals as well?

23 MR. HULSE: Well, Your Honor, I can speak to the
24 first paragraph. The first paragraph is a PTO 23 motion
25 that's dismissal, so our understanding is that's held over

1 for October.

2 THE COURT: It is, thank you.

3 Anything further on that Ms. Zimmerman?

4 MS. ZIMMERMAN: No, Your Honor. I think the other
5 were just updates for the Court's record with respect to
6 there is obviously the pending motion for new trial on the
7 Gareis matter that's fully briefed.

8 Additionally, the defendants filed a bill of
9 costs, and we have filed an objection and that is out
10 standing.

11 And then the defendants also noted that they had
12 filed a letter requesting leave to file a motion for
13 reconsideration on the general causation summary judgment
14 and Daubert issues. Plaintiffs also filed a letter opposing
15 that request, and those are before the Court, if the
16 Court -- just by way of update.

17 THE COURT: Okay. Thank you. All right. Well,
18 let's talk about the future then of MDL2666. Who would like
19 to start?

20 MS. ZIMMERMAN: So, Your Honor, this item was
21 added to the agenda for the first time at our request this
22 month, and it is really we think part and parcel or related
23 to the initial motion that we brought to remand the *Walton*
24 and *Johnson* matters. You know, during the status
25 conference, I believe it was in July where we had the honor

1 of being before all three judges in this case for the last
2 appearance for Judge Noel, the Court asked the question
3 about whether or not the parties had engaged in any
4 settlement conversations, and there have been no settlement
5 conversations at this point.

6 And so while we are happy to engage in these kind
7 of conversations, and I think that there could be some
8 productive collaborations in that regard either between the
9 parties or with the guidance of the Court, given that we are
10 at that point right now, we do think that it is time to talk
11 about where we're headed next.

12 From the plaintiffs' perspective, that starts with
13 the remand of *Walton* and *Johnson*. And the plaintiffs have
14 brought as a preliminary matter a motion for suggestion of
15 remand of both the *Walton* and *Johnson* cases. That motion
16 was filed, I believe, on September 4th, and defendants have
17 opposed that.

18 But, briefly, the reason that defendants state,
19 the real reason that the Court should not remand these
20 particular cases is essentially that this Court is familiar
21 with the issues that are involved in this litigation and
22 that's certainly true. This Court has been intimately
23 involved in litigating this case for nearly three years now,
24 but familiarity with the defense and the evidence is not a
25 sufficient reason to keep the cases here. And, frankly,

1 Your Honor, we put this in our papers, but we think it is
2 fundamentally at odds with the MDL statute 1407A, and the
3 case law that has analyzed that statute.

4 And we would point Your Honor and the Court
5 specifically to the *Lexecon* case and that started out in the
6 Ninth Circuit, and we would point specifically both to then
7 Judge Kozinski's dissent in that case, which was then
8 essentially adopted by the United States Supreme Court where
9 they really talk about how when Congress passed 1407, they
10 talked about how the cases shall be remanded at the
11 conclusion of the pretrial proceedings and it's mandatory
12 language.

13 So, and Judge Kozinski's dissent is from the Ninth
14 Circuit, there is important because he really helps discuss
15 what it means to be pretrial proceedings, what the courts
16 mean, and what the parties meant and understood that to mean
17 at the time.

18 And I've actually got I think it's house, got the
19 what is this the House Report Number 90-1130 from 1968
20 actually discussing the legislative history behind 1407, but
21 really the issue is when you have case specific discovery
22 coordinated in an MDL like this one, that is for coordinated
23 pretrial proceedings, and that is historically understood to
24 be those kinds of proceedings or discovery that is generally
25 applicable to more than a couple of cases.

1 So in *Lexecon* and when it was in the Ninth
2 Circuit, Judge Kozinski talks about pretrial proceedings
3 under 1407 being obviously limited to those raising issues
4 common to the other cases, primarily discovery. That's the
5 entire purpose of the multi-district process. And if you go
6 forward and look at some of the House Judiciary Committee
7 report in explaining the cases have to be remanded to the
8 transfer order court for trial, the House Judiciary
9 Committee recognized that in most cases there will be a need
10 for local discovery proceedings to supplement those that
11 were done in the MDL, and that consequently remand to the
12 originating district for this purpose will be desirable.

13 That's what Congress talked about when they passed
14 this statute and so there was mandatory language that
15 explains that when the coordinated pretrial discovery is
16 completed, that these cases shall be remanded.

17 So certainly in this case, there's no contention
18 by 3M that the coordinated pretrial proceedings are ongoing.
19 And, in fact, defendants really couldn't reasonably make
20 that argument because while plaintiffs have attempted to
21 conduct additional discovery on generalized issues through
22 subpoenaing, for example, Dr. Mankowitz, and that was
23 quashed not once but twice, but when plaintiffs have sought
24 to do additional discovery with respect to depositions of
25 those employees at 3M that were responsible for the

1 coordinated back door approach to the FDA in getting the
2 letter of August of 2017, those requests have been denied by
3 defense counsel as outside the scope of general causation or
4 untimely.

5 So to the extent that the defendants have
6 continued to take the position that plaintiffs are not
7 allowed to do additional generalized discovery, pretrial
8 generalized discovery is thus closed.

9 Now, with respect to the complaints in *Walton* and
10 *Johnson*, Mr. Walton's case was filed in Texas in 2013. It
11 was originally filed in state court. It was removed to
12 federal court. I think that there is actually another state
13 defendant, but somehow it is still -- it was in federal
14 court, but at any rate, those proceedings went far away down
15 the track before Judge Hoy. There were a number of
16 different proceedings. There were depositions. And in
17 fact, defendants as we outline in our moving papers,
18 defendants opposed centralization of the MDL generally, but
19 quite specifically with respect to Mr. Walton's case and
20 Mr. Johnson's case, they said look, panel, if there's going
21 to be an MDL, okay, now we're on board with that, send it to
22 Minnesota, but these two cases need to be kept out because
23 they're way down the track, and we're ready for trial. That
24 was the position that they took as officers of the Court in
25 2015.

1 So now is the time, Mr. Walton, Mr. Johnson, they
2 have been waiting since 2013 and 2014 to have their trial.
3 We have completed generalized discovery before Your Honors
4 in this MDL. Close to a hundred depositions I think across
5 the employees and expert witnesses have been conducted.
6 Much of the discovery has been done. To be sure there is
7 going to be some additional discovery, but there are also
8 issues particularly with respect to the Walton case that
9 really are held over before Judge Hoyt and some of that is
10 sealed, and we can't really get into that.

11 But the issue about conduct in that case was there
12 was an evidentiary hearing, and there is a sealed order
13 before Judge Hoyt that Mr. Walton, the plaintiff in that
14 matter, is eager to get back down to Texas to have his day
15 in court and to try his case. And given the language in
16 1407, and given the fact that we have already completed, and
17 we won't be permitted to do additional generalized discovery
18 touching on issues that really relate to all of these cases,
19 we believe that it is time to remand now those two cases,
20 which is why we've asked for a suggestion of remand, which
21 we would then bring to the JPML.

22 And, additionally, we believe again for some of
23 the same reasons and getting into the choice of law issues
24 and the fact that it seems that we're going to be heading
25 for application of 50 states different laws, that the time

1 for remand really ought to be now. And maybe that doesn't
2 mean that we start by remanding 5,000 cases and that they
3 all head back immediately, but I would point, we pointed in
4 our moving papers to recent remand orders in the *Biomet* MDL,
5 which is before Judge Miller in the Northern District of
6 Indiana. There have been no bellwether trials in that case.

7 Now, that case has been pending since 2011, but
8 some of the issue in that case have to do with the fact that
9 the defendant is also an Indiana resident, and so there are
10 some issues with respect to whether or not there are going
11 to be trials in federal court there because there is
12 diversity issues.

13 But principally at the end of the day, what Judge
14 Miller said was, look, we're going to be applying the law of
15 the 50 states where these 500 cases are from, and so what
16 needs to happen now rather than have me, Judge Miller, make
17 a decision about the application of statutes of repose and
18 statutes of limitations and statutes versus common law in
19 all 50 states, let's come up with a plan for how we remand
20 these.

21 Judge Goodwin has done some of the same things in
22 the *Transvaginal Mesh* litigation, which has also been
23 ongoing since 2011. And then most recently, Judge -- this
24 is in the District of Arizona on the *Bard IVC Filter* case.
25 I'm trying to remember which judge this is in front of, but

1 I have a copy of the order if Your Honor would like to look
2 at it. There has been one trial in that MDL, and, again,
3 they're starting out with a remand of 12 cases.

4 So it's not the case that MDLs need to have
5 completed dozens of trials or even any trials in the case of
6 the *Biomet* litigation. The issue really gets to be has that
7 pretrial coordinated discovery been completed? And if so,
8 following the mandatory language under 1407, when and how do
9 we get the cases remanded so that justice not be denied so
10 that these cases keep moving forward, and that's certainly a
11 benefit for the defendants as well.

12 If their position is these are cases they don't
13 want to settle and that's certainly a position they take so
14 far, then let's get busy with it. Let's try some cases
15 across the country. We're ready to do that. But it's a
16 real issue.

17 So from the plaintiffs' perspective, we need to be
18 starting with a remand of the two cases that they didn't
19 want to have here to begin with and that we ought to work
20 with the Court and with defense counsel to come up with a
21 workable plan to remand these cases for trial across the
22 country.

23 THE COURT: What do you have to say about
24 settlement other than what you've already said? No, I get
25 what you've said. I just want to know if there's anything

1 further about settlement in general?

2 MS. ZIMMERMAN: I think that it's something that
3 particularly at this juncture makes a lot of sense to talk
4 about as we're on the precipice of talking about remanding
5 these all across the board.

6 THE COURT: Okay.

7 MS. ZIMMERMAN: I think we've learned a lot in
8 trying *Gareis* and working up *Axline*, but it takes more than
9 one to dance.

10 THE COURT: Right. From the plaintiffs'
11 perspective, I think there's a question in my mind whether
12 you all want the Court involved in that process or if you
13 view that as appropriate given all that's gone on. Where
14 are you on that?

15 MS. ZIMMERMAN: We would certainly welcome the
16 Court's involvement and guidance in that process.

17 THE COURT: Okay. Thank you, Ms. Zimmerman.

18 MS. ZIMMERMAN: Thank you.

19 THE COURT: Mr. Blackwell?

20 MR. BLACKWELL: Your Honor, picking up with the
21 Court's kind of last question about the Court's involvement
22 in this, perhaps the most helpful thing the Court can do for
23 the collective of all of us is to help us winnow down this
24 pool of cases. At this point, it is a bloated docket, and
25 the plaintiffs are signing up cases in some instances with

1 little more than proof that there's been an orthopedic
2 surgery and an infection developed thereafter, and maybe a
3 Bair Hugger was used, as we see repeatedly.

4 A number of these cases are filed don't even have
5 product ID in them, and how it is that we could be expected
6 to have a meaningful discussion about settlement without
7 making sure first we've got a grouping of what are really
8 good cases is difficult to do. And part of the benefit of
9 the bellwethers is it helps us to learn more, to identify
10 better what would be the characteristics of a good, viable
11 solid case.

12 We've only had one bellwether at this point. What
13 the plaintiffs are asking the Court to do on the rubric of
14 discussing settlement under topic number nine is again to
15 drain the entire pool as they were attempting to do just a
16 month or two ago in trying to withdraw *Lexecon* waivers where
17 there is no good cause shown for that.

18 Now, there is equally no good cause for attempting
19 to dismiss the MDL because essentially our work here is
20 done. There is no more to do. There's no MDL court in the
21 country that has done what the plaintiffs are recommending
22 at this stage in this case. That essentially the Court has
23 gone through here almost three dozen, well, almost 30
24 pretrial orders in helping to configure this litigation to
25 manage this docket of cases.

1 The goal is to have the cases when they leave this
2 MDL be ready to go to trial when they transferred back to
3 the transferred courts under 1407, that would mean that the
4 consolidated pretrial proceedings are done. At this point,
5 we've had two pretrial proceedings. We've had Gareis and
6 now we have Axline, and so that leaves us almost 5,000 more
7 that are not done, and the plaintiffs would simply have this
8 Court throw those cases back out to a hundred or so federal
9 district courts around the country like so many marbles for
10 them to simply pick up. And no court in an MDL has ever
11 done that. There's no good cause for it here either.

12 If the plaintiffs are seriously interested in
13 talking about resolution, and I haven't seen it yet, they
14 would themselves come up with some sorts of protocols to put
15 into place to figure out the wheat from the chaff, what are
16 legitimate, solid valid claims from those which are not.
17 And if the cases that we've had come up for trial in the
18 bellwether pool are any indication the overwhelming majority
19 have simply gone away one after the other because they won't
20 meritorious for one reason or another. And, in fact, we had
21 to repopulate the pool because so many were simply gone, and
22 that were reflective of the 5,000, how many of those would
23 even remain, Your Honor.

24 So at this stage it's difficult for us to conceive
25 of how it is the plaintiffs want to discuss resolution when

1 the work hasn't been done yet to reduce this volume of cases
2 down to that which is really legitimate, and we are
3 certainly hopeful to have some assistance from the Court as
4 we proceed along in this, and it maybe that the Court may
5 find other bellwether trials to be instructive in that sense
6 also in helping us to get a better sense of kind of where
7 we're heading.

8 THE COURT: Let me ask you this.

9 Are you -- do the defendants, let me see how I ask
10 it better. On this issue, for example, of product ID, I
11 understand the defendant's position. And, obviously, if no
12 Bair Hugger was used or if plaintiffs can't establish a Bair
13 Hugger was used, defendants probably don't want to pay for
14 that. I understand that.

15 Is there -- do you see the Court devising a
16 process or a mechanism for separating those cases from those
17 where there is product ID? Or is that something the
18 plaintiffs need to do in your view or the parties need to do
19 together? Where do we go with that?

20 MR. BLACKWELL: Well, Your Honor, I would
21 certainly have more hope but not confidence were the Court
22 to engage in a process in that regard. I just would not be
23 as hopeful as what may come of the conjoined efforts of the
24 parties to do that, as it may be to some extent against the
25 interest of the plaintiffs who have gone and filed cases

1 where there is no proof of Bair Hugger usage in the first
2 place. That would be one thing that would be helpful as to
3 me a very fundamental kind of threshold. If you don't have
4 any proof that the Bair Hugger was in fact even used, then
5 what are we doing here exactly? And that would be one
6 screen that would get erected.

7 There will be other screens too, for example,
8 there has been no proof, there is nobody who is opining
9 about specific causation in the case. And if there isn't a
10 competent qualified opinion that the plaintiffs' injuries
11 are attributable to the Bair Hugger, then what are we doing
12 here exactly since it is the claim of the lawyers that the
13 Bair Hugger is caused in these infections. That's not
14 validated to prove backed up by proper affidavit presumably
15 some treater that will say that or other suitable expert
16 testimony, then that to me would represent potentially
17 another proper screen.

18 There may be other cases where we have very long
19 latencies to the extent that nobody could reasonably
20 conclude that there is possible proof that the Bair Hugger
21 is the cause.

22 So there are any number of these that in fact may
23 be helpful at some point to have an audience with the Court
24 to discuss generally what some of these screenings or
25 filters or touch stones could look like. If you have a very

1 common commensal skin bacteria, and there's no way to be
2 able to rule out a source or rule out the skin itself as the
3 source, then the question comes back what are we doing
4 exactly?

5 So it is at this point with a pool of close to
6 5,000 cases, and the question is there interest in
7 settlement? The answer is yes, there's always interest, but
8 do we have anything viable to work with to have a meaningful
9 discussion? At this point, we don't yet. Given the nature
10 of the docket, it needs to be cleaned up.

11 THE COURT: I think you already answered this, but
12 is this something that you think I should order the parties
13 to get together with me to do at least preliminarily to talk
14 about as a former colleague of mine would say bucketizing
15 the cases. Here's a bucket of cases that we don't have
16 product ID on or here's a bucket of cases where it's a long
17 latency. Is that a useful step at this juncture?

18 MR. BLACKWELL: Your Honor, it would be extremely
19 useful not just for settlement but even in terms of what
20 bellwethers we try because once we've managed to bucketize
21 it, we're able to see then have we tried certain cases from
22 certain buckets? That would tell us something that perhaps
23 we haven't seen or heard or understood yet from a jury.

24 So I think it would be helpful for that purpose
25 also, so the answer is yes, we do think that would be a

1 useful thing, and, in my view, for all purposes of this MDL.

2 THE COURT: Okay. Great. Thank you,
3 Mr. Blackwell.

4 MR. BLACKWELL: Thank you, Your Honor.

5 THE COURT: Ms. Zimmerman?

6 MS. ZIMMERMAN: Yes, thank you, Your Honor.

7 I join my colleague in agreeing that I think the
8 Court could be useful on some of this. I do feel compelled
9 to say that I think to the extent that there continue to be
10 representations that the plaintiffs have not produced
11 product ID or proof of exposure to Bair Hugger, frankly,
12 that's just not consistent with the facts of this case. And
13 we started the pretrial conference today with Your Honor
14 explaining the number of cases that have been filed and even
15 the number of cases that have been dismissed either jointly
16 or pursuant to Court Order. There are several hundred of
17 those to be sure, but there is a process that specifically
18 addresses this question about whether or not the plaintiffs
19 have produced adequate proof with respect to exposure both
20 to injury and exposure to this product and that is pretrial
21 order number 14, specifically, paragraph number four.

22 So defendants are certainly capable and have
23 availed themselves of the agreed upon process with respect
24 to core deficiencies, and I guess the reason I'm compelled
25 to say something is that to the extent that the Court is

1 continuing to hear argument that plaintiffs have not
2 produced evidence that they are in fact exposed to Bair
3 Hugger, that's just not the case. And so I would say that
4 that's really important.

5 I think that the other piece is that there is no
6 defendant fact sheet in this case, unlike any other MDL that
7 I'm aware of. Now, I appreciate whose burden it is to
8 establish exposure to the Bair Hugger, but it's just not
9 fair to say that the plaintiffs haven't done that. Because
10 if it was true, there was an overwhelming problem where the
11 plaintiffs have failed to produce evidence that there is in
12 fact a Bair Hugger exposure in an injury, the number of
13 cases that have been dismissed wouldn't be 400, it would be
14 thousands, but that's not the case here. And so I just want
15 to make sure that the Court recalls that there is a process
16 to address these kinds of things.

17 You know that said, I do think that there is a
18 process to winnow down and bucketize the cases, as Your
19 Honor kind of indicated, and to the extent that there's a
20 proof question, we were able to do this jointly with some
21 instruction and kind of guidance from the Court as we went
22 through that bellwether process not once but twice. And
23 really what we did is we essentially exchanged charts on
24 where the defendants were really legitimately challenging
25 the plaintiffs' proof of use. So, you know, is that

1 something we can do in a week on 5,000 cases? Maybe not,
2 but I will say that we did it quite expeditiously on, you
3 know, the first round of cases was 150, and the second round
4 was 100 cases.

5 So, you know, maybe there are some outliers out
6 here. Maybe there are some, I mean to be sure I get some
7 questions that sometimes I think are requiring additional
8 investigation, but, you know, if someone has got an
9 affidavit from a hospital, for example, saying there was no
10 Bair Hugger used, I agree that's not a case that shouldn't
11 be here. But that's absolutely the exception and not the
12 rule.

13 And so I just want to make sure as the Court is
14 considering how we best bucketize, you know, the cases
15 pending before Your Honor and in this MDL, I do think that
16 we take some umbrage with the representations made there.
17 But I do think that there's a role for the Court in helping
18 us to understand this, and we'd welcome that.

19 THE COURT: Okay. And I think the question really
20 comes down to when it would be most appropriate for the
21 Court to step in and sort of facilitate however the process
22 of the settlement discussion is going to take place, when
23 it's appropriate for the Court to step in to that role and,
24 you know, I'm willing to do it any time. I don't know what
25 the parties' views exactly of that particular question is.

1 So I mean, is now the time or is it not now the time?

2 MS. ZIMMERMAN: From the plaintiffs' perspective,
3 Your Honor, honestly the time was in 2016 when we first
4 started getting involved, and I think one of the things that
5 happens in these kinds of cases is there gets to be a little
6 bit of a -- there is some stigma in terms of who calls who,
7 who walks over to whose office, and what does that
8 communicate about the kind of strength or faith you have in
9 your ability to bring your claims?

10 So what I have seen some of the other cases that
11 I've been involved in in the past five years is that really
12 out of the gates, there are lawyers appointed from both
13 sides to really facilitate those kind of settlement
14 conversations not because it's necessarily expected that
15 settlement will happen in the first months or two months of
16 an MDL, but that because if a court gets involved early in
17 facilitating these conversations so that the buckets are
18 something that both sides are talking about from the
19 inception, it's easier to kind of step off the curve and
20 have real meaningful discussions.

21 So I think that, I guess that's a long way of
22 saying I think that it is time not because necessarily the
23 first conversation is going to be productive but because we
24 have to have a first conversation to ever get to an ultimate
25 conversation. So I think that the role of the court could

1 certainly be meaningful.

2 We do worry from the plaintiffs' perspective,
3 while we want to engage in good faith in trying to explore
4 potential resolution, and see if there's agreement, what we
5 don't want to have happen is also to then high jack, you
6 know, potential remand and kind of work up of additional
7 cases if we're not going to have real good faith substantive
8 conversations about kind of where we're headed next.

9 So I guess I would say the sooner the better from
10 the plaintiffs' perspective and, you know, you can always
11 have a conversation and decide it's not productive for
12 either side and who knows where it ends up going? But you
13 got to talk to figure out if there's anything to talk about.

14 THE COURT: Understood. And, you know, I mean
15 good faith is in the eye of the beholder, right?

16 MS. ZIMMERMAN: Yes, Your Honor.

17 THE COURT: And one of the things I'm trying to
18 figure out is if the parties are at a point where, for
19 example, I'm not saying the defendants are saying this, but
20 if they're at a point where they're saying based on what we
21 know to date, we are just not really able or interested in
22 settling these cases. You know, I don't care to waste
23 everyone's time. I don't necessarily take the defendant's
24 word on that. Obviously, I have to make my own sort of
25 judgment, but let me hear from Mr. Blackwell, again.

1 MR. BLACKWELL: Your Honor, just to clear up one
2 small thing on this issue of whether there's ID in cases. I
3 don't make this statement as an abstraction. It's because
4 we have been here time and again to find out that just Bair
5 Hugger wasn't used. It was in the hospital, but not used in
6 this surgery, and we've had cases dismissed on that basis.

7 And Your Honor was just here even a hearing or so
8 ago, a status hearing, where it's been discussed, well, you
9 know, we know that there was an orthopedic surgery. There
10 was an infection. We don't necessarily know yet if it was
11 used or not, which was astounding frankly and because the
12 case is already in suit without even knowing that. That
13 informs our concerns about that issue, and the fact there is
14 now this sort of amorphous mass of 5,000 cases where we know
15 that dynamic exists. No doubt exists in there too, probably
16 in a meaningful way.

17 With respect to the bucketizing of the case, it's
18 our view that the most useful thing we first talked about
19 how it is we winnow this down into a population of cases
20 that we can have a meaningful discussion about. If we don't
21 do that first, I'm concerned that simply the mere idea of
22 there being settlement discussions will be the clarity and
23 call that will cause a bloated docket of cases to become
24 infinitely even more bloated because now the bell has been
25 sounded. There's a discussion of settlement, and then they

1 will all flood in, and we'll still have now the problem
2 magnified of still not being able to separate the wheat from
3 the chaff, what are good cases and which ones are really not
4 so good.

5 So it's our view the timing is now but it's for
6 the first step of what kind of things can we put into place
7 to winnow this down.

8 THE COURT: Very well. Understood.

9 MR. BLACKWELL: Thank you.

10 THE COURT: Thank you, Mr. Blackwell.

11 All right. On the remand, obviously, I'll speak
12 with Judge Ericksen, but I'm fairly confident she's going to
13 want to -- she will decide that, again, that would be a
14 report and recommendation to make a recommendation to, you
15 know, possibly remand. That's inefficient. I don't know
16 whether she'll want further argument on it or not, but I'll
17 confer with her on that.

18 On the question of how we move forward with
19 respect to call it settlement, call it winnowing the cases,
20 what we do, again, you know, I'll also speak with Judge
21 Ericksen, but I'm inclined to start bringing the parties
22 together in a room or the lawyers together in a room to talk
23 about how we get our arms around the future of this MDL and
24 these cases. By saying that, I am not saying, you know, the
25 defendants are going to agree that there are 5,000 cases

1 that need to be settled, and if winnowing or separating the
2 wheat from the chaff is important to getting to a
3 meritorious discussion or a real discussion of meritorious
4 case settlement, obviously, we've got to do that. I don't
5 expect the parties to agree necessarily which cases are
6 meritorious, but I guess that may well be where I come in,
7 so.

8 All right. Let me ask you, Ms. Zimmerman, is
9 there anything further that you think we can or should deal
10 with this morning?

11 MS. ZIMMERMAN: I don't believe so, Your Honor.

12 THE COURT: Okay. Thank you. Mr. Blackwell?

13 MR. BLACKWELL: No, that's it, Your Honor.

14 THE COURT: Okay. Well, thank you all. We are in
15 recess.

16 (Court adjourned at 10:31 a.m.)

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19 REPORTER'S CERTIFICATE

20 I, Maria V. Weinbeck, certify that the foregoing is
21 a correct transcript from the record of proceedings in the
22 above-entitled matter.

23
24 Certified by: s/ Maria V. Weinbeck

25 Maria V. Weinbeck, RMR-FCRR